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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-

MIDESSA TELEVISION COMPANY, INC. et al.,
Petitioners,

v.

MIDLAND TELECASTING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES A. ELLIS, JR.
GEORGE M. KRYDER, III

CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

Attorneys for Petitioners

Bowne of Dallas Printed in U.S.A.

QUESTIONS PRESENTED

1. Whether the first amendment and the Federal Communications Act of 1934 by implication preclude federal antitrust courts from exercising jurisdiction over a cable television system's failure to receive and carry to its subscribers a television broadcaster's programming.

2. Whether a cable television system's failure to initiate administrative proceedings or its failure to carry to its subscribers a television broadcaster's programming is a "restraint of trade or commerce" within the Sherman Act.

3. Whether a Court of Appeals should reverse a trial court's dismissal of the entire case by incorrectly stating that the trial court did not rule on one or more of the issues in the case.

PARTIES TO THE PROCEEDING

Plaintiff-Appellant: Midland Telecasting Company

Defendants-Appellees: Midessa Television Company, Inc.; Doubleday Broadcasting Company, Inc.; Tall City TV Cable Co.; Community Cablevision Company; Cablecom-General, Inc.; Hodge Enterprises; J. Howard Hodge, Deceased; Communicable of Texas, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory, and Regulatory Provisions Involved	2
Statement of the Case	3
Reasons for Allowance of the Writ	8
A. The Court of Appeals decided important questions of federal law that have not been but should be settled by this Court	8
B. The Court of Appeals, in reversing the trial court, decided the federal questions in a way in conflict with the applicable decisions of this Court	10
1. *Effect of the Communications Act*	10
2. *Effect of the First Amendment*	19
3. *Application of Antitrust Principles*	20
C. The Court of Appeals, in denying that the trial court ruled on the Section 7 claim, so departed from the accepted and usual course of judicial proceedings as to require exercise of this Court's power of supervision	20
Conclusion	23
Appendix	A-1

a. Opinion of the United States Court of Appeals, Midland Telecasting Co. v. Midessa Television Co., Inc., 617 F.2d 1141 (5th Cir. 1980) A-1
b. Findings of Fact and Conclusions of Law, United States District Court A-17
c. Order and Judgment, United States District Court A-23
d. Judgment, United States Court of Appeals A-24
e. Order Denying Rehearing, United States Court of Appeals A-26

TABLE OF AUTHORITIES

Page

Cases:

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 21

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6, 19, 20

FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 7, 8, 19, 21

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 13, 14

General Telephone of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969) 16

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 6, 10, 12, 14, 15, 16, 17, 18

Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) 10, 12, 14

Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975) 21

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) .. 10, 12, 15, 16, 17, 18

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 6, 20

United States v. Midwest Video Corp., 406 U.S. 649 (1972) 10, 15

United States v. National Association of Securities Dealers, 422 U.S. 694 (1975) 6, 10, 12, 14, 16, 17

United States v. Philadelphia National Bank, 371 U.S. 321 (1963) 13, 14

United States v. Radio Corp. of America, 358 U.S. 334 (1959) 12

Page

United States v. Southwestern Cable Co.,
392 U.S. 157 (1968) .. 6, 8, 10, 12, 13, 14, 15, 16, 17, 18, 20
United States v. Terminal R.R. Ass'n,
224 U.S. 383 (1912) 21

STATUTORY PROVISIONS

Clayton Act §4, 15 U.S.C. §15 ..... 2, 21
Clayton Act §7, 15 U.S.C. §18 ..... 3, 7, 22
Communications Act of 1934,
as amended, 47 U.S.C. §151, et seq. 8
Communications Act of 1934, 47 U.S.C. §153(a) 3
Sherman Antitrust Act,
as amended, 15 U.S.C. §1, et seq. 2, 5, 8, 9

REGULATIONS

47 C.F.R. §74.1101 et seq. (1966) 8
47 C.F.R. §74.1109 (1966) 4
47 C.F.R. §76.1 et seq. (1972) 8
47 C.F.R. §76.7 (1972) 4, 5
47 C.F.R. §76.11(a) (1972) 5

REPORTS

First Report and Order, 38 F.C.C. 683 (1965) 17
Second Report and Order, 2 F.C.C. 2d 725 (1966) 17

PERIODICAL

Von Kalinowski, *The Per Se Doctrine —*
An Emerging Philosophy of Antitrust Law,
11 U.C.L.A. L. Rev. 569 (1964) 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Midessa Television Company, Inc., et al, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below is reported at 617 F. 2d 1141 (5th Cir. 1980) and is reprinted in the Appendix herein at 1-16. The unreported order, findings of fact, and conclusions of law of the United States District Court for the Western District of Texas are reprinted in the Appendix herein at 17-23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered May 29, 1980. The order denying rehearing was dated June 25, 1980. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1) (1970).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. CONST., Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal***.

Clayton Act, 38 Stat. 731, 15 U.S.C. §15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §152(a):

> (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §18:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.***

STATEMENT OF THE CASE

In 1967 Community Cablevision Company ("Cablevision"), a partnership comprised of petitioner Midessa Television Co., Inc. and others[1], was formed and obtained a

[1] The partners included Midessa Television Company, Inc.; Doubleday Broadcasting Company, Inc.; Cablecom-General Inc.; Hodge Enterprises; and J. Howard Hodge, deceased.

franchise by city ordinance to operate a cable television system in Odessa, Texas. Cablevision carried, among others, the signals of the three area VHF network-affiliated stations, including those of two of its venturers. Respondent Midland Telecasting Company ("Midland") was a licensee for a UHF television station in Midland, Texas. Intermittently, from June 8, 1969 to March 16, 1971 and again from March 26, 1973 to October 15, 1974, Midland broadcast a signal and sporadically had its signal carried on a cable television system in Midland, Texas.[2]

According to its allegations and its deposition testimony, Midland orally requested Cablevision to carry its signal on the cable in Odessa, expecting Cablevision to bear the expense of employing microwave or other equipment to transport its signal from Midland, Texas to Odessa, Texas so that it could be received and carried. But Cablevision failed to do so. The Federal Communications Commission ("FCC") regulations in effect prior to 1972 apparently did not state the commission's view of whether the public interest required cable systems, upon an oral request by a broadcaster, to incur the expense of transporting a weak signal to the cable system. The regulations, however, did contain procedures for presenting such policy, legal, and factual issues for determination.[3]

From March 16, 1971, until March 26, 1973, Midland ceased broadcasting. After resuming broadcasting in 1973, Midland claims that it again requested that its signal be added to the Odessa cable. During this period, FCC regulations clearly prohibited the addition of television

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[2] The Midland, Texas cable system was owned by petitioner Tall City TV Cable Co.

[3] 47 C.F.R. § 74.1109 (1966) was virtually identical to 47 C.F.R. § 76.7 (1972), quoted in footnote 5, *infra*.

broadcast signals to cable systems without FCC approval.[4] The regulations also provided means for a broadcaster to initiate FCC proceedings to compel carriage of its signal.[5] Midland claims that in November 1973 it wrote to the FCC seeking relief, but it did not obtain any ruling that its signal be carried or further prosecute its petition. After Midland's signal became more powerful, so that large additional expense was not necessary, Cablevision secured FCC consent and added Midland's signal to its cable system on May 4, 1974, shortly before it was served with the complaint in this action. The signal was carried until October, 1974, during the pendency of this action, when Midland ceased broadcasting and ceased all business activity.

In this action against Cablevision, its partners, and two other defendants,[6] Midland asserts federal question jurisdiction under 28 U.S.C. §1331 and claims that defendants violated Section 1 of the Sherman Act by failing to carry its signal prior to May 4, 1974, and by failing previously to seek an administrative decision for the carriage of its signal. On motions by defendants filed following extensive

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[4] 47 C.F.R. § 76.11(a) (1972) provided in pertinent part:

> No cable television system shall . . . add a television broadcast signal to existing operations unless it receives a certificate of compliance from the [FCC] . . . .

[5] 47 C.F.R. § 76.7 (1972) provided:

> (a) On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

[6] Also named as defendants were Tall City TV Cable Co. and Communicable of Texas, Inc.

discovery, the district court dismissed the entire complaint on various grounds.[7] The trial court held that the FCC had exclusive jurisdiction to determine, under its public interest standard, whether a cable television system may fail to carry particular television broadcast communications and that it was inappropriate for a federal antitrust court to decide such issues. The district court concluded that Congress had authorized the FCC to regulate questions concerning whether, when and under what conditions signals are to be carried by cable television systems, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and that under the principles of *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975), such regulatory scheme displaces the antitrust laws as to that discrete and limited regulated matter. Further, on the basis of the pleadings, discovery and the full summary judgment record before it, the district court held as a matter of law, under the principles of *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), that Cablevision was justified in refraining from carrying Midland's signal until FCC approval had been obtained and, under the principles of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), that Cablevision's failure to petition the FCC for a decision could not be an antitrust violation. The trial court also concluded that Midland lacked standing because its alleged injury — resulting

[7] The grounds asserted in the motion were: (1) lack of jurisdiction under the antitrust laws because of exemptions or immunities therefrom; (2) lack of standing; (3) failure to state a claim upon which relief could be granted; (4) defendants were entitled to summary judgment or judgment on the pleadings as a matter of law; and (5) alternatively, as to events or transactions occurring during specific time periods, a failure to state a claim or a conclusively established defense of limitations.

from its signal not being carried on a television communications cable for a period of time — was not of the type against which the antitrust laws were intended to protect. It found that Midland was not claiming damages from the formation or franchising of Cablevision, and it granted defendants' motion for summary judgment as to the entire case, including Midland's claim under Section 7 of the Clayton Act.

A two-judge panel of the United States Court of Appeals for the Fifth Circuit reversed, focusing on FCC regulations and reports and reasoning that because the FCC had not issued substantive regulations, effective at the times of the failure to carry the signal and prohibiting the carriage of Midland's signal, there was no repugnancy between the FCC carriage rules and antitrust principles. The Court of Appeals, recognizing the requirement in the 1972 rules that a signal not be added to a cable system until the FCC issued a certificate of compliance, held that "there is no indication that this procedure was onerous or that the FCC would refuse certification." 617 F.2d, at 1149. It viewed the issue of the strength of Midland's signal to be a fact issue for the antitrust trial court and jury rather than one for administrative expertise. 617 F.2d, at 1144, n. 6. Further, despite the trial court's dismissal and judgment disposing of the entire case, the Court of Appeals held that the trial court had not considered the claim under Section 7 of the Clayton Act, 617 F.2d, at 1143-44, n. 4; and it did not consider the issue. Finally, although this Court's opinion in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) was discussed extensively in post-argument memoranda, the Court of Appeals did not advert to the first amendment implications of a claim that an antitrust violation occurred when a communications me-

dium failed to voluntarily carry particular communications to its viewers.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court of Appeals decided important questions of federal law that have not been but should be settled by this Court.

Cable television is a relatively new and mushrooming communications medium whose impact on the lives of Americans is significant. This Court has never had an opportunity to determine the extent to which the Communications Act of 1934[8] and the first amendment affect the applicability, if any, of the Sherman Act[9] to a failure of a cable television system to carry a particular broadcaster's programming.

This Court has recently recognized that cable television systems are part of the press "media" protected in their editorial decisions by the first amendment. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). In the Communications Act of 1934, Congress granted the FCC broad power to regulate communications by wire and radio; and this Court has specifically held that such power includes the power to regulate a cable television system's carriage of television signals. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). The FCC has exercised such power and by regulations provided a comprehensive body of substantive and procedural rules for regulating, in the public interest, the selection of television communications to be carried by cable television systems. *See* 47 C.F.R. §74.1101 et seq. (1966); 47 C.F.R. §76.1 et seq. (1972). The rules specify

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[8] 48 Stat. 1064, as amended, 47 U.S.C. § 151, et seq.

[9] Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §1, et seq.

general standards as to when carriage of particular signals is in the public interest and procedures for hearing and deciding disputes on such issues. The FCC has power to issue orders enforceable by contempt and subject to judicial review.

However, there was no such FCC ruling that is challenged in the instant case. Here, the plaintiff Midland did not prosecute a request to the FCC for resolution of any such issues, but instead, after it increased the power of its signal and as the defendant cable system with FCC approval began carriage of its signal, Midland brought an antitrust claim based on the non-carriage in the past. Although a cable system's carriage of broadcast television communications is not an economic transaction involving payment or receipt of consideration between the television broadcaster (which has released its signal into the airways) and the cable system (which receives the signal for its subscribers), the plaintiff broadcaster here contended that the failure to carry its signal was a "restraint of trade or commerce" within Section 1 of the Sherman Act. Until this case, no reported decision explored the applicability of the Sherman Act to such communications activities of cable television systems.

The application of the Sherman Act, read in light of the first amendment and as affected by the Communications Act, to a failure by a cable television system to carry programming of a particular broadcaster, is important to the orderly development of the burgeoning new communications medium of cable television, to the executive branch of the federal government in its performance of the responsibilities delegated by Congress in the Communications Act and in its enforcement of the antitrust laws, and to the judicial branch in defining its jurisdiction in this important area, as well as to parties having interests in private litigation such as the instant case.

The record is appropriate for deciding the broad and important legal issues involved, uncluttered with extraneous factual or evidentiary disputes or issues concerning the more technical elements of a substantive cause of action or defense under the Sherman Act. They are pure and broad issues of law, ripe for decision, and begging for final authoritative resolution by this Court.

B. The Court of Appeals, in reversing the trial court, decided the federal questions in a way in conflict with the applicable decisions of this Court.

1. *Effect of the Communications Act*

In *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 379 (1973); *Pan American World Airways v. United States,* 371 U.S. 296 (1963), this Court established the standards and principles for determining whether courts should infer a congressional intent in regulatory legislation to remove particular and discrete regulated activities from the regime of competition as fostered by the antitrust laws. Applying those principles to the legislative intent manifested in the Communications Act of 1934, as examined and related to cable television systems in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972), the trial court concluded that the FCC had been granted exclusive jurisdiction to decide the legality of a cable system's failure to carry a television communication; and it accordingly dismissed the antitrust complaint and entered a summary judgment that the plaintiff broadcaster take nothing. The Court of Appeals reversed.

The Court of Appeals gave token recognition that congressional intent should determine the existence of an

implied antitrust exemption or immunity applicable to regulated activity. 617 F.2d, at 1146. However, it decided the case without reference to congressional intent either in 1934 when the Communications Act was enacted or in subsequent failures of Congress to enact modifying legislation. Rather, the Court of Appeals concentrated upon the actions of the FCC over the years in making the quasi-political determinations of the "public interest" as to cable system carriage of television signals. It quickly became diverted from the issue of whether it should infer that *Congress,* in 1934 and thereafter, had intended the FCC to be the single governmental agency, to the exclusion of antitrust courts, authorized to decide the propriety of a failure of a cable system to carry a television signal. The Court of Appeals neither cited nor discussed this Court's recent decisions concerning principles of exclusive jurisdiction or implied antitrust immunity nor did it analyze the nature or extent of the *power* conferred by *Congress* on the FCC to regulate cable systems. Rather, it became preoccupied with the issue that should have been presented to the FCC for resolution: whether the regulations declaring the "public interest" as might have been determined by the FCC, as of particular times, required that Midland's programming be carried on the cable in Odessa. It concluded its analysis as follows:

> In this case, CCC [Cablevision] had not demonstrated how FCC regulation interfered with the exercise of its business judgment with respect to the decision whether to carry Midland's signal. The regulations did not prohibit carriage of the signal, and, indeed may have required it. CCC's [Cablevision's] refusal was not therefore compelled by federal regulation. Accordingly, no repugnancy exists between the FCC carriage rules and antitrust principles.

617 F.2d, at 1141. The Court characterized its decision as a "holding that *FCC carriage rules did not operate to create an antitrust immunity* for CCC's refusal to carry Midland's signal," *Id.*, (emphasis added) citing the obvious, but inapplicable, principle mentioned in *United States v. Radio Corp. of America,* 358 U.S. 334 (1959) ("RCA") that the FCC was not created to decide antitrust issues as such and that its actions do not themselves prevent enforcement of the antitrust laws in federal courts.

Both the analysis and result of the Court of Appeals conflict with the applicable decisions of this Court. Since establishing in 1959 in *RCA* that the agency action itself is not the guidepost, this Court has subsequently made clear in several significant cases that it is the express and inferred *legislative intent* of Congress that determines whether the regulatory agency was granted exclusive jurisdiction over the particular activity in question. *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 379 (1973); *Pan American World Airways v. U.S.,* 371 U.S. 296, 304-05, 309-10 (1963).

Where there is no express provision on this point in the regulatory statute, the crucial legislative intent may be determined both from the purposes of the regulatory legislation, as evidenced by legislative history, and from the scope of the regulatory scheme as established by the legislation and its authoritative constructions.

This Court explored the legislative history of the Communications Act, particularly as it relates to regulation of cable television systems, in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968). Quoting in part from the message to Congress from President Roosevelt, recom-

mending creation of the FCC, and from its prior decision relating to radio communications, this Court there concluded that

> the Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio." It was for this purpose given "broad authority." . . . [T]he Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory scheme for the [broadcasting] industry." F.C.C. v. Pottsville Broadcasting Co. 309 U.S. 134, 137.

Id., at 168. Congress had acted to avoid a feared monopolistic domination in the new and far-reaching science of broadcasting. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Its regulatory scheme of granting and denying licenses and construction permits based on public convenience, interest, or necessity was deemed to be more appropriate to avoid that feared evil than the then existing regime of laws. *See Id.* The "public convenience, interest, or necessity" criterion apparently was the most concrete yet supple standard with which to guide the expert body in the executive branch charged by Congress with carrying out the broad legislative policy. *Id.*, at 138. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court held that same legislative policy extended to regulation of carriage of television signals by cable systems.

In addition to the legislative history, the character and extent of the power conferred by the regulatory legislation is instructive in inferring whether Congress intended antitrust courts to have any concurrent jurisdiction with the regulatory agency. The test, as enunciated in *United States v. Philadelphia National Bank*, 371 U.S. 321, 352 (1963), is whether the regulatory scheme at issue

> is so comprehensive that the enforcement of the antitrust laws would either be unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure.

In making this determination, this Court has focused upon whether there is an irreconcilable conflict between the *regulatory power* delegated to an agency and the *judicial power* of an antitrust court over the activity in question such that regulated parties could be subjected to duplicative or inconsistent standards. *United States v. National Association of Securities Dealers,* 422 U.S. 694, 734-35 (1975). Petitioners assert that there is such an irremediable conflict here, in that the *power* granted the executive branch, on the one hand, to require or forbid carriage of a signal, and the asserted judicial power on the other, to impose treble damages for failure to carry a signal, are mutually repugnant. Under these circumstances the Court of Appeals, following this Court's applicable decisions, should have determined, as the trial court did, that the antitrust laws were displaced in this limited and discrete instance. *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 392, n. 14, (1973).

Contrary to the holding of the Fifth Circuit, enforcement of the antitrust laws in the instant case is inappropriate in view of both the completeness of the regulatory power and the disruption that conflicting antitrust judgments could render to the regulatory structure. *United States v. Philadelphia National Bank,* 371 U.S. 321, 352 (1963). The conduct charged as an antitrust violation here involves the precise subject matter of the regulatory power vested in the FCC. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968). *See Gordon v. New York Stock*

Exchange, 422 U.S. 659, 683-84 (1975); *Pan American World Airways v. United States,* 371 U.S. 296, 305 (1963). The FCC pervasively regulates the carriage of television signals on cable systems, and closely monitors ongoing developments in cable communications. *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972).

In *Southwestern Cable,* this Court emphasized that pervasive FCC regulation of cable systems is vital to the achievement of the purposes intended by Congress, noting that:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population. The Commission has reasonably found that the successful performance of these duties demand prompt and efficatious regulation of community antenna television systems. We have elsewhere held that we may not 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'

392 U.S. 157, at 177 (1968) (citations omitted). Judge (now Chief Justice) Burger, writing for the D.C. Circuit Court of Appeals, after analyzing the statutes and the FCC regulations applicable to cable systems, reached a similar conclusion as to the pervasiveness of the regulatory power of the FCC over cable television systems:

> As we view the record now before us and consider it in light of our own holdings and the holdings of the Supreme Court, it seems clear that as the outlines of

> the CATV problems emerge, the Commission acted within the scope of the Act and consistent with the broad purposes of the Act by treating its responsibilities as *comprehensive and pervasive.* Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority.

General Telephone of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969) (emphasis added), *cert. denied,* 396 U.S. 888 (1969).

Like the regulatory agencies involved in *United States v. National Association of Securities Dealers,* 422 U.S. 694 (1975) (Securities and Exchange Commission) and *Pan American World Airways v. United States,* 371 U.S. 296 (1963) (Federal Aviation Administration), the FCC was granted by Congress the uncontested power to consider the legal, factual, and policy issues and determine whether it was in the public interest to authorize or require the addition of a broadcaster's signal to the array of programming on a cable system, as well as the power to issue orders necessary to the execution of its function. *See United States v. Southwestern Cable Co.,* 392 U.S. 157, 178-79, 180 (1968). In the instant case, Midland could have presented its dispute to the FCC and sought a decision pursuant to the applicable standards of the public interest, convenience, or necessity but it chose not to do so. Intrusion by an antitrust court into this area would be unwarranted, duplicative and contrary to congressional intent.

This Court consistently has found justification for implied antitrust immunity to be stronger when the agency may consider in its decision-making the effects of competition. *See Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *United States v. National Association of Se-*

curities Dealers, 422 U.S. 694 (1975); *Pan American World Airways v. United States*, 371 U.S. 296 (1963). Particularly in *National Association of Securities Dealers, supra*, this Court found persuasive the fact that the SEC had power to weigh competitive concerns in the exercise of its supervisory responsibility. 422 U.S., at 732. Here, the FCC specifically is required to take competition into consideration in making the assessment of the public interest relating to cable television operations.[10]

In the instant case as in that case, the regulatory aims determined by Congress could be thwarted by inconsistent standards prescribed contemporaneously by antitrust courts and the FCC. *Cf. Gordon v. New York Stock Exchange*, 498 F.2d 1303, 1306 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975). The congressional issuance of the broad and pervasive mandate for the FCC to regulate in the public interest whether and when cable television systems will carry broadcast communications is repugnant to a notion that such carriage decisions should result from unbridled free competition.

Congress intended to rely upon the FCC's expertise in the field of cable television. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). This Court has opined that

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[10] This Court noted in United States v. Southwestern Cable Co., 392 U.S. 157, 175 n. 43-44 that as early as 1959, Congress was concerned with the competitive effects cable television had on the orderly development of television and that such concern led to the promulgation of signal carriage restrictions. See First Report and Order, 38 FCC 683 (1965); Second Report and Order, 2 FCC2d 725 (1966). In its First Report and Order respecting cable television, the Commission found that cable television creates "substantial competition" for local broadcasting and that "the likelihood or probability of [cable television's] adverse impact upon potential and existing services has become too substantial to be dismissed." 38 FCC 683, 707, 713-14 (1965).

the existence of such reliance upon agency expertise suggests a finding of implied antitrust immunity. *Gordon v. New York Stock Exchange,* 422 U.S. 659, 689-90 (1975). Antitrust courts are without the expertise of the FCC to evaluate the dynamic and technical aspects of cable television (including the varying effective power of broadcast signals which the Court of Appeals here thought should be "fact issues" in an antitrust trial), or to render comprehensive "public interest" policy judgments for the orderly development of a national network of television communications. If the congressional intent is to be implemented, the FCC must be permitted to regulate, comprehensively and without interference, questions concerning whether, when, and under what conditions broadcast television communications are to be carried on cable television systems. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968).

It seems apparent that the FCC cannot effectively implement congressional intent to establish a coordinated national communications policy if its decisions whether communications should be carried on a cable system are subject to contradictory judgments of antitrust courts. As this Court reasoned in *Pan American World Airways v. United States,* 371 U.S. 296, 310 (1963):

> if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide.

371 U.S., at 310.

The opinion of the Fifth Circuit will foster such a collision of the two regimes. The resolution of this question of first impression will prevent such a collision of antagonistic jurisdictions, and thereby will promote the public interest.

2. *Effect of the First Amendment*

There are other significant reasons why the antitrust laws do not apply to a failure, for a time, by a cable television system to carry a broadcaster's signal. First, as pointed out in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709, n. 19 (1979), there are significant constitutional implications of any ruling that a cable television system (a part of the "media") is or was required to carry program material over which it had no editorial discretion or control. In that case, however, this Court found in the Communications Act itself sufficient statutory indications of congressional intent to safeguard the journalistic freedom and editorial discretion of cable television systems and to invalidate the FCC's public access rules. That same congressional intent like its parallel constitutional inspiration in the first amendment is further instructive upon whether the antitrust laws apply to a failure of a cable system to carry a particular signal or its failure to seek necessary administrative consent for such carriage. It is well established that the Sherman Act must be construed and interpreted in ways that will preclude its infringement upon constitutional rights. *E.g. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Here, the plaintiff's complaint is that the defendants violated the Sherman Act by failing to carry a signal whose editorial content was controlled exclusively by the plaintiff itself. However, the Court of Appeals did not even mention or consider the constitutional implications of its ruling.

The defendants contend that, as a matter of law, their failure to seek from the FCC an administrative decision on the question of carriage could not be an antitrust violation. Just as a concerted attempt to influence legislative or executive governmental action is constitutionally protected from antitrust scrutiny, *Eastern Railroad Pres-*

idents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), they contend that their failure to seek action by the FCC could not be a violation of the Sherman Act. The Court of Appeals merely held in a footnote, that a failure or refusal to attempt to influence the FCC does not enjoy the same constitutional protection as an attempt to influence it.

The case should at least be remanded for consideration of the constitutional issues.

3. *Application of Antitrust Principles*

The Court of Appeals failed fully to consider the bases of the district court's dismissal of the complaint and erroneously stated that the challenged inactivity of Cablevision could state an antitrust claim as a group boycott or the denial of access to essential services. Petitioners respectfully urge that Respondent failed to state a claim under any potential theory of antitrust liability.

Contrary to the suggestion of the Court of Appeals, the failure of Cablevision to carry Midland's television communications cannot, as a matter of law, constitute a "group boycott." The term "group boycott" connotes "a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen." Von Kalinowski, *The Per Se Doctrine — An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. Rev. 569, 580, n.49 (1964). In the instant case, there was no refusal or inducement of others to refuse to trade or enter into any business transactions. Rather, Midland merely alleged that Cablevision failed to carry to its subscribers Midland's broadcast signal that was free for the taking by the public. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-62 (1968). Such inactivity simply does not constitute a "group boycott."

The Court of Appeals further opined that the failure to carry Midland's signal might constitute a "denial of access to essential services." Neither the decision cited by the Court of Appeals, *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383 (1912), nor any other authority of which petitioners are aware, supports or even suggests such a theory of antitrust law. Indeed, a holding that Cablevision was required to carry Midland's signal would, in effect, contrary to congressional intent, render it a "common carrier." *Cf. FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

Particularly in light of the Communications Act and the first amendment, the antitrust laws are not intended to protect television broadcasters from failure of cable systems to carry their signals. When it alleged injury from such a failure, Midland did not allege injury resulting from "anything forbidden in the antitrust laws", 15 U.S.C. §15, and thus, it lacked standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Similarly, since Congress created the FCC to stand between broadcasters and cable systems as the regulator of cable carriage of broadcast signals, a broadcaster lacks standing under the antitrust laws to complain of a failure to carry its signal. *See Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975).

Thus, the Court of Appeals has erroneously decided questions of the applicability of the Sherman Act to the inactivity of which petitioners are accused; and its ruling is in conflict with applicable decisions of this Court.

C. The Court of Appeals, in denying that the trial court ruled on the Section 7 claim, so departed from the accepted and usual course of judicial proceedings as to require exercise of this Court's power of supervision.

The trial court granted a summary judgment of dismissal of the entire case. In the findings of fact and conclu-

sions of law the district court found that Midland did not claim any antitrust injury by reason of the conception or creation of Cablevision or by reason of its seeking or securing a franchise to operate in Odessa. This is patently obvious since Midland's complaint was not of the existence and operation of the cable system; its complaint was of the delay of the cable in carrying its signal. It had admitted this to the trial court. Nevertheless, despite this finding and admission and the dismissal of the entire case, the Court of Appeals stated in a footnote, that the district court had not ruled on the applicability of Section 7 of the Clayton Act to the facts.

The opinion in this regard is blatantly incorrect. By so misstating the obvious and express facts and lower court holding, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. At least a writ of certiorari should be issued and the case remanded to the Court of Appeals for consideration of the Section 7 aspects of the trial court's dismissal of the entire case.

CONCLUSION

Petitioners respectfully urge the Court to grant a writ of certiorari, to reverse the decision below, and to remand the case to the United States Court of Appeals for the Fifth Circuit with appropriate instructions.

Respectfully submitted,

JAMES A. ELLIS, JR.
GEORGE M. KRYDER, III

CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

Attorneys for Petitioners

APPENDIX

MIDLAND TELECASTING COMPANY,

Plaintiff-Appellant,

v.

MIDESSA TELEVISION COMPANY, INC., et al.,

Defendants-Appellees.

No. 78-2515.

United States Court of Appeals,
Fifth Circuit.

May 29, 1980.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE,* AINSWORTH and SAM D. JOHNSON, Circuit Judges.

AINSWORTH, Circuit Judge:

This is an antitrust suit brought by a UHF television station against a cable television company and its co-owners alleging that its refusal to carry plaintiff's UHF signal on its cable violated the antitrust laws.[1] The district court granted defendants' motion for summary judgment primarily on the ground that federal regulation of cable television created an implied immunity from the effect of the antitrust laws. We reverse.

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* Judge Tuttle did not participate in either the consideration or determination of this case.

[1] Suit was also brought against two companies involved in the operation of broadcasting in nearby communities but who were not co-owners of the cable company.

Plaintiff Midland Telecasting Company (Midland) operated a UHF television station from Midland, Texas. It broadcast on Channel 18 from June 8, 1969 to March 16, 1971 and from March 26, 1973 to October 15, 1974.

In 1967, defendant Community Cablevision Company (CCC) was created for the purpose of operating a community antennae television (CATV) system in nearby Odessa, Texas. CCC was a joint venture by defendants Midessa Television Company (Midessa), Doubleday Broadcasting Company (Doubleday), Hodge Enterprises, J. Howard Hodge, and Cablecom-General, Inc. Both Midessa and Doubleday were direct competitors with Midland. Midessa operated a VHF station, affiliated with NBC, located between Midland and Odessa. Doubleday operated another network-affiliated VHF station located in Odessa. In 1968, CCC was granted an exclusive franchise by the City of Odessa to operate a CATV or cable system in Odessa. CCC carried the signals of the three VHF stations serving the Midland-Odessa area including the signals of the two VHF stations owned by joint venturers Midessa and Doubleday.[2] By the end of 1971, a significant portion of the homes in Odessa subscribed to CCC's cable system.

In its complaint,[3] Midland alleged that from 1969 until the filing if this suit in 1974, CCC refused to carry Midland's signal on its cable despite repeated requests to do so, and that the refusal was designed to eliminate Midland

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[2] Besides the stations owned by defendants Midessa and Doubleday, CCC carried the third VHF station operating in the Midland-Odessa area. That station was not involved in the CCC joint venture.

[3] The allegations are set forth in Midland's Third Amended Complaint filed August 9, 1976 (R. 647). Midland moved for leave to file a Fourth Amended Complaint. After hearing oral argument,

from the Midland-Odessa television broadcasting market. As a result, it is averred that Midland could not become a "commercially viable enterprise" or obtain network affiliation, and was forced to halt broadcasting from March 1971 until March 1973 and later from October 1974 until the present time. Thus, Midland alleged that from 1969 until 1974, the defendants engaged in a continuing combination and conspiracy to restrain competition in the television broadcasting industry in the Midland-Odessa market in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[4] Midland sought treble damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, as well as injunctive relief and attorney's fees.

The district court granted defendant Midessa's motion to dismiss and for summary judgment on the basis of findings of fact and conclusions of law prepared by counsel for Midessa.[5] While the district court relied on a number of grounds, it primarily found that (1) Midland lacked stand-

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the district court did not rule on the motion prior to entering its order dismissing the action.

[4] Midland also claimed that the formation of CCC by Midland's competitors constituted a violation of section 7 of the Clayton Act, 15 U.S.C. § 18. The district court did not rule on the applicability of section 7 to the facts alleged in this suit, and accordingly this issue is not presented on appeal. Midland's Fourth Amended Complaint raised claims based on section 2 of the Sherman Act, 15 U.S.C. § 2. Since the district court did not rule whether Midland could file its amended complaint, the section 2 claim is also not raised on appeal.

[5] A district court's acceptance of the findings of fact and conclusions of law prepared by the prevailing party to a suit, while not prohibited, should be discouraged since it leaves the reviewing court with doubt concerning the actual basis of the trial judge's decision. See *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 257-258 (5th Cir. 1980).

ing to assert the claim, and (2) defendants were immune from antitrust scrutiny by virtue of federal regulation over cable television.[6] We discuss these points in order.

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[6] Three other issues raised by the district court's decision do not require extended discussion.

First, appellees argue that CCC's refusal to carry Midland's signal is protected by the *Noerr-Pennington* doctrine because CCC would have had to obtain FCC approval in order to carry the signal. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The basis of the doctrine is the "need to protect efforts directed to government officials for the purpose of seeking redress." *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372, 1382 (5th Cir. 1980). Here, appellees do not claim that they did anything designed to influence the FCC directly, but rather that they are entitled to *Noerr-Pennington* protection for failing or refusing to bring an administrative proceeding. As such, there was no effort to influence governmental action within the meaning of the doctrine. *Cf. Mid-Texas Communications*, 615 F.2d at 1384.

Appellees also argue that the district court's decision should be affirmed because there was no issue of material fact. In similar circumstances, the Supreme Court has stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller v. CBS*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). *See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 486 (5th Cir. 1967). Here, contrary to the district court's resolution, it is clear that there exist several issues of material fact. Foremost is the motive and intent of the appellees in refusing Midland's requests to have its signal carried. The fact that Midland does not have any direct evidence of im-

1. STANDING

Standing for damage actions under the antitrust laws is controlled by section 4 of the Clayton Act which grants standing to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15. *See* 2 P. Areeda & D. Turner, Antitrust Law § 334a (1978). The allegations in this case are clearly sufficient to afford Midland standing. Midland alleged injury in fact to its business in that it lost advertising revenues and was forced to stop broadcasting because of CCC's refusal to carry its signal. Antitrust liability is based upon the theory that defendants either took part in a group boycott, *see Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), or acted in concert to refuse access to an essential facility,

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proper motive is not determinative as the Supreme Court made clear in *Poller*. Appellees' asserted defense that Midland's signal was too weak to be carried, while it may present an adequate defense at trial, *cf. E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), must be proven first and the quality of Midland's signal is disputed. Accordingly, summary judgment was not warranted since issues of material fact existed which should be resolved by a jury.

Finally, appellees contend that Midland cannot collect any damages for the period from March 16, 1971 to March 26, 1973 since Midland was not then broadcasting a signal. But if appellees' alleged illegal conduct was the proximate cause of Midland's inability to broadcast, appellant is entitled to recover lost profits even though it was not broadcasting. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974). *See generally* Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv.L.Rev. 1566 (1967). The question whether appellees' actions were responsible for Midland's failure to broadcast, and if so, what damages, if any, were sustained, are issues of fact to be resolved by the jury.

see United States. v. Terminal Railroad Association, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). As such, the alleged injury is the type which if proven the antitrust laws seek to prevent. Finally, the injury is alleged to be the direct result of defendants' unlawful conduct.

The district court's reliance on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) and *Jeffrey v. Southwestern Bell,* 518 F 2d 1129 (5th Cir. 1975) on the issue of standing is misplaced. In *Brunswick,* operators of bowling alleys sought damages for profits allegedly lost when defendant unlawfully acquired certain unprosperous alleys and operated them itself instead of permitting them to fail. The Supreme Court denied recovery since plaintiffs had failed to demonstrate "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489, 97 S.Ct. at 697. It is clear that in the present case the injury alleged flows directly from defendants' group boycott or refusal to deal. In *Jeffrey,* residential telephone subscribers challenged Bell's equipment policies of buying only from its wholly-owned subsidiary. This court held that Bell's retail customers were not the "target" of the alleged monopolistic practices and therefore did not have standing since they could not "adequately vindicate the purposes of the antitrust laws." *Jeffrey,* 518 F.2d at 1131. The court stated that antitrust standing should be granted to that "sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* Midland, under the allegations in its complaint, was the target of the conspiracy and as such is an adequate representative of that sector of the economy which is threatened by the alleged anticompetitive acts of the defendants. As such, Midland has standing under section 4.

2. IMPLIED IMMUNITY

It is undisputed that the Federal Communications Act of 1934 (the Act), 47 U.S.C. § 151 *et seq.*, does not explicitly provide an exemption from the antitrust laws for a cable television company's decision as to which signals it will carry.[7] The district court, however, held that the existence of Federal Communication Commission's (FCC) regulation concerning carriage of signals by cable systems created an implied immunity from the antitrust laws for CCC's refusal to carry Midland's signal.

The Supreme Court has held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963) (footnotes omitted). *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-98, 96 S.Ct. 3110, 3120, 49 L.Ed. 2d. 1141 (1976). Judicial unwillingness to imply an immunity reflects the importance of antitrust principles in the structure of the American economy. By enacting the antitrust laws, Congress intended to "establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978) (footnote omitted). *See Carnation Co. v. Pacific*

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[7] The Communications Act provides explicit exemptions from the antitrust laws only for telephone company consolidations and acquisitions. 47 U.S.C. §§ 221(a), 222(c)(1). The existence of an explicit exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions. *See, e.g., California v. FPC*, 369 U.S. 482, 485, 82 S.Ct. 901, 904, 8 L.Ed.2d 54 (1962); *Cain v. Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979).

Westbound Conference, 383 U.S. 213, 218, 86 S.Ct. 781, 784, 15 L.Ed.2d 709 (1966). Accordingly, antitrust immunity will be implied only if necessary to permit the regulatory scheme to function, and then only to the "minimum extent necessary." *Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963). *See Mid-Texas Communications Systems, Inc. v. AT&T,* 615 F.2d 1372, 1379 (5th Cir. 1980).

The starting point for determining the existence of an implied immunity is the intent of Congress. *United States v. Borden Co.,* 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). The Act does not explicitly provide for FCC authority to regulate cable television since in 1934 when it was passed Congress did not anticipate the development of cable technology. With the advent of the cable systems during the 1950s, the FCC studied possible regulatory responses to the potential conflict between cable and television broadcasting. In 1959, the FCC concluded that since cable operators were neither common carriers nor broadcasters within the meaning of the Act, it has no authority to regulate them. *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959). After an unsuccessful attempt to obtain clarifying legislation from Congress, the FCC reversed its position and asserted jurisdiction over cable broadcasting. *Carter Mountain Transmission Corp.,* 32 F.C.C. 459 (1962), *aff'd,* 321 F.2d 359 (D.C.Cir. 1962), *cert. denied,* 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963). In 1966, the FCC issued a comprehensive order setting forth regulations for the industry. *Second Report and Order,* 2 F.C.C.2d 725 (1966). *See generally* Smith, *Primer on the Regulatory Development of CATV* (1950-72), 18 Howard L.J. 729 (1975). *See also* D. LeDuc, *Cable Television and the FCC: A Crisis in Media Control* (1973).

The Supreme Court upheld the FCC's general authority to regulate cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). Despite the lack of explicit authorization, the Court based its decision on the fact that Congress had granted the FCC broad authority over "all interstate and foreign communication by wire or radio . . ." 47 U.S.C. §152(a). *Southwestern Cable, supra,* 392 U.S. at 167-68, 88 S.Ct. at 2000. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). The FCC's power over cable television, however, is not unlimited. The FCC can regulate cable television only where its regulations are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." *Southwestern Cable,* 392 U.S. at 178, 88 S.Ct. at 2005. *See Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765, 767 (2d Cir. 1978) (FCC may regulate cable systems if it furthers a "goal which [the FCC] is entitled to pursue in the broadcast area"), *cert. denied,* 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1979). Thus, the Supreme Court recently rejected an effort by the FCC to compel cable systems to provide common carriage of public-originated transmissions because doing so would convert cable broadcasters into common carriers which is inconsistent with FCC authority over broadcasting. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). *See Home Box Office v. FCC,* 567 F.2d 9 (DC.Cir. 1977), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977). *See generally Comment, FCC Authority Over Cable Television,* 1979 Wisc.L.Rev. 962.

An examination of FCC regulation concerning carriage access rules for cable systems in effect during the period 1969-1974 shows that CCC was not prevented from carrying Midland's signal by reason of regulatory constraints.

Until 1972, carriage access requirements were covered by the FCC's *Second Report and Order,* 2 F.C.C.2d 725 (1966) [*1966 Rules*]. Cable companies were required to carry the signals of any local broadcast station. *1966 Rules* 2 F.C.C.2d at 752-53. They were not permitted to import distant signals into the nation's 100 largest television markets. *1966 Rules,* 2 F.C.C.2d at 782. The FCC also provided for certain restrictions to minimize duplication of programming. *1966 Rules,* 2 F.C.C.2d at 747. None of the restrictions established by the 1966 Rules was applicable to Midland's signal. Accordingly, while it is not clear whether Midland was a local broadcaster in the Odessa community so that its signal would have been required to be carried, it is certain that the 1966 Rules did not prohibit CCC's carriage of Midland's signal. Moreover, under the 1966 Rules, there was no requirement that a cable system obtain FCC approval prior to carrying a station's signal. The cable company simply had to notify the station and the FCC of its action. *1966 Rules,* 2 F.C.C.2d at 803-04 (§ 74.1105).

The carriage rules were amended in 1972. *Cable Television Report and Order,* 36 F.C.C.2d 141 (1972) [*1972 Rules*]. The FCC divided television markets by size and promulgated rules for each type market. Since the Midland-Odessa market was not one of the top 100 television markets, the "smaller television market" rules were applicable to CCC. *1972 Rules,* 36 F.C.C.2d at 214 (§ 76.5(i)). As a general matter, the FCC carriage provisions were designed to assure that all "local" stations were carried on a cable system. *1972 Rules,* 36 F.C.C.2d at 173. "Local" was defined to include signals of stations within 35 miles of the cable system. The 35-mile provision was especially designed to aid in the development of UHF stations. As the FCC stated in its report:

> All cable systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the

> cable system's community. This requirement, based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations — generally UHF — whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively than they could under our old carriage rules; they will be capable of extending their coverage into the area that we have determined is generally necessary for the development of broadcasting stations.

1972 Rules, 36 F.C.C.2d at 174 (footnote omitted). The 1972 Rules also changed the notification requirement relating to a cable system adding a signal. Specifically, the new rule provided that "[n]o cable television system shall commence operations unless it receives a certificate of compliance from the Commission." *1972 Rules,* 36 F.C.C.2d at 217 (§ 76.11(a)). As with the 1966 Rules, nothing in the FCC regulations prohibit carriage of Midland's signal.[8]

A cable broadcaster's selection of signals to be carried on its cable is significant. The array of stations offered to

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[8] The rules promulgated by the FCC for smaller television markets are as follows:

> § 76.59 *Provisions for smaller television markets.*
>
> A cable television system operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:
>
> (a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

potential subscribers is one of the primary selling points of the cable system. Accordingly, the cable company's decision on which stations to carry is an important exercise of its business judgment. Ordinarily, the cable company might base its decision on a variety of business reasons including the station's broadcast offerings or the projected viewing preferences of the cable's subscribers. As the Supreme Court has recognized, the mere fact that a business decision is subject to a degree of regulatory control does not automatically result in an antitrust immunity. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In this case, CCC has not demonstrated how FCC regulation interfered with the exercise of its business judgment with respect to the decision whether to carry Midland's signal. The regulations did not prohibit carriage of

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(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets within whose Grade B contours the community of the system is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vermont-Plattsburgh, New York television market);

(5) Television translator stations, with 100 watts or higher power, licensed to the community of the system;

(6) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

36 F.C.C.2d at 230-31. Under these rules, CCC may have been required to carry Midland's signal. Resolution of this point depends on certain factual questions which are best resolved on remand.

the signal, and, indeed, may have required it. CCC's refusal was not therefore compelled by federal regulation. Accordingly, no repugnancy exists between the FCC carriage rules and antitrust principles. If the refusal violated antitrust laws, a finding of liability would not undermine or conflict with the regulatory scheme. Given the FCC's policy to promote UHF broadcasting, the regulatory and antitrust principles are, in fact, complementary.

In holding that FCC carriage rules did not operate to create an antitrust immunity for CCC's refusal to carry Midland's signal, we are guided by the Supreme Court's decision in *United States v. RCA*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). In *RCA*, the United States brought suit alleging that RCA violated the antitrust laws by coercing another company to exchange television stations with it. RCA defended on the ground that the exchange had been considered and approved by the FCC. The Court held that neither the general provisions of the Communications Act nor the specific actions of the FCC served to create an antitrust immunity for the acts complained of by the government. "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." *RCA, supra*, 358 U.S. at 346, 79 S.Ct. at 464. Indeed, numerous courts have refused to imply antitrust immunity in a number of factual circumstances involving federal regulation over the communications industry. *See, e. g., Mid-Texas Communications, supra* 615 F.2d at 1377; *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1116-24 (3d Cir. 1979); *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 934 (9th Cir. 1975); *Jarvis, Inc. v. AT&T*, 481 F.Supp. 120, 123 (D.D.C.1978); *MCI Communications Corp. v. AT&T*, 462 F.Supp. 1072, 1089-96

(N.D.Ill.1978); *United States v. AT&T*, 461 F.Supp. 1314, 1320-30 (D.D.C. 1978).[9]

Appellees argue that before Midland's signal could be added to the cable it was necessary for CCC to file a statement with the FCC, and that this filing procedure acted to create an antitrust immunity. The argument is without merit. Under the 1966 Rules, CCC only had to notify the station and the FCC of its intention to add the signal. While the 1972 Rules required the FCC to issue a certificate of compliance prior to CCC being able to add the signal, there is no indication that this procedure was onerous or that the FCC would refuse certification.[10] In essence, the certifica-

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[9] Appellees seek to distinguish *RCA* on the ground that in that case the Supreme Court was considering antitrust immunity within the confines of the FCC's regulatory authority under Title III of the Communications Act concerning regulation of broadcasting whereas FCC authority over cable televisions arises from Title I of the Act. This argument is incorrect. First, the Supreme Court decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), and *FCC v. Midwest Video Corp.*, 440 U.S 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), hold that while the FCC general authority over cable broadcasting arises from Title I, its specific authority is exercised in conjunction with its authority over broadcasting under Title III. As such, the *RCA* decision is directly relevant. Moreover, appellees have failed to demonstrate the significance of a holding that FCC authority arises under Title I. Cases concerning Title II and the FCC's regulation over common carriers have also refused to find antitrust immunities. See, e. g., *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372 (5th Cir. 1980); *MCI Communications Corp. v AT&T*, 462 F.Supp. 1072, 1978-1084 (N.D.Ill.1978). Accordingly, since the issue is not relevant to our ultimate determinations, we need not resolve whether the question of antitrust immunity must be considered within the confines of Title I or Title III.

[10] The FCC description of the procedure indicates the pro forma nature of the certificate requirement:

tion requirement was analogous to a licensing requirement. The *RCA* decision makes clear that the FCC's licensing power does not, in and of itself, confer antitrust immunity. *RCA, supra,* 358 U.S. at 348-52, 79 S.Ct. at 466-68.

Appellees also argue that they should not be subject to antitrust liability given the fact that Midland could have brought an action before the FCC to compel carriage. This contention is also without merit. There is no requirement that an antitrust plaintiff exhaust administrative remedies as a prerequisite to bringing an antitrust suit. *Mid-Texas Communications, supra,* 615 F.2d 1380 (plaintiff permitted to prosecute antitrust action for wrongful failure of telephone company to interconnect its long-distance facilities despite existence of procedure under Communications Act

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Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a "go, no-go" basis – i. e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases. And, for the same reason, we have no intention of re-evaluating on request of cable systems in individual proceedings the general question settled in our carriage and exclusivity rules Rather, we strongly believe that cable systems must generally operate under these rules and that, only after meaningful experience, will we be in position for a general reassessment. 2 F.C.C.2d at 186-87.

whereby plaintiff could have compelled interconnection). *See RCA, supra,* 358 U.S. at 352, 79 S.Ct. at 468; *Carnation, supra,* 383 U.S. at 224, 86 S.Ct. at 787-88.

In light of the fact that FCC regulation of carriage access for cable broadcasting did not conflict with antitrust principles in the context of CCC's decision to carry Midland's signal, there is no justification for holding that appellees have antitrust immunity. Accordingly, the judgment must be reversed and the case remanded for trial.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MIDLAND TELECASTING COMPANY

v.

MIDESSA TELEVISION COMPANY, INC., et al.

No. MO-74-CA-47

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the motion by defendant Midessa Television Company, Inc. to dismiss and for judgment, the briefs in support and in opposition thereto, the pleadings, depositions, affidavits, other documents on file, and the argument of counsel, the court now makes the following findings of fact and conclusions of law:

Findings of Fact

From the plaintiff's complaint, briefs and argument, it appears undisputed and the Court finds as follows:

(a) Community Cablevision Company is a joint venture, comprised of other defendants herein, formed in 1967 to construct and operate a CATV system in Odessa, Texas;

(b) Such joint venture received a franchise from the City of Odessa, Texas, by city ordinance, to operate such CATV system;

(c) Since 1968 such joint venture has operated such CATV system;

(d) During the relevant period the Federal Communications Commission has regulated CATV systems as to questions of carriage of television signals;

(e) The plaintiff was an independent (not affiliated with a major TV network) licensee for the operation of a UHF television station in the city of Midland, Texas:

(f) The plaintiff operated its station from June, 1969, until March, 1971, and thereafter from March 26, 1973, until October 15, 1974;

(g) Previously, on May 4, 1974, before any defendants were served with process in this case, Community Cablevision Company began carrying the signal of the plaintiff, pursuant to permission and authority therefor by the Federal Communications Commission.

(h) The plaintiff does not assert or claim any antitrust injury by reason of the conception or creation of Community Cablevision Company or of its efforts to induce the city counsel of Odessa to grant it a franchise, or of the actual granting of such franchise of such city;

(i) Administrative approval of the Federal Communications Commission was necessary before the signal of the plaintiff could be legally carried on the CATV system of Community Cablevision Company;

(j) Federal Communications Commission regulations did not preclude the plaintiff from seeking and receiving an FCC ruling on any request it may have had for carriage on the CATV system of Community Cablevision Company.

(k) The plaintiff's claim is that the Sherman Act was violated by alleged refusals of the defendants to apply to the FCC for approval of carriage of plaintiff's signal on the CATV system of Community Cablevision Com-

pany prior to the actual granting of such approval in 1974.

CONCLUSIONS OF LAW

1. The Federal Communications Commission was granted by Congress in the Communications Act statutory jurisdiction to regulate the question of carriage of signals by CATV systems.

United States v. Southwestern Cable Company, 392 U.S. 157, 20 L.Ed.2d 1001 (1968). In exercising such jurisdiction it may issue rules and regulations and prescribe such conditions not inconsistent with law as public convenience, interest or necessity require. *United States v. Midwest Video Corp.* 406 U.S. 649, 32 L.Ed.2d 390 (1972).

2. Congress has vested in the Federal Communications Commission final authority to determine whether, when, and under what conditions the signals of television stations may or shall be carried upon CATV systems. The regulatory scheme mandated by Congress is pervasive, at least insofar as it applies to the question of carriage raised in the instant case. There can be no reconciliation of the FCC's authority to determine such questions of carriage with any Sherman Act declaration (as may be asserted by the plaintiff) that a refusal to apply for FCC permission or a refusal of carriage is or can be illegal. The antitrust laws must give way, at least in this narrow and discrete area of carriage of signals on CATV systems, if the regulatory scheme established by the Communications Act is to work. Thus, the plaintiff's complaint under the Sherman Act must be dismissed. *U.S. v. National Association of Security Dealers,* 422 U.S. 694, 45 L.Ed.2d 486(1975); *Pan American World Airways, Inc. v. U.S.,* 371 U.S. 269, 9 L.Ed.2d 325 (1963).

3. Maintenance of an antitrust action for failure to apply to the FCC for a ruling or for failure to carry a signal on a CATV system, as alleged herein, poses a substantial danger that the defendants would be subjected to duplicative and inconsistent standards, as to the carriage of television signals on CATV systems. Additionally, a failure or refusal to seek an administrative decision that the public interest would be served by carriage of a signal cannot be a violation of the antitrust laws. Cf. *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965).

4. If the federal antitrust laws were applied to the question of carriage of television signals on CATV systems, the sophisticated regulatory program of the FCC would not work. The two statutory concepts are sufficiently mutually repugnant to compel the inferrence that Congress intended to repeal any antitrust laws otherwise applicable to the area of carriage. See, *Phonetele, Inc. v. American Telephone and Telegraph Company,* 435 F.Supp. 270 (C.D. Calif. 1977) ; *Dasa Corp. v. General Telephone Company of California;* 1977—2 Trade Cases ¶61,611 (C.D.Calif. 1977).

5. The Federal Communications Commission is vested with exclusive jurisdiction over questions of carriage of television signals by CATV systems; and Congress intended an immunity from antitrust attack for a refusal of carriage of a television signal on a CATV system. The statutory authority granted the FCC to regulate the carriage of CATV systems creates an exemption from the antitrust laws for any refusal of carriage, or refusal to apply for permission for carriage, at issue herein.

6. Any refusal by the defendants to carry the signal of the plaintiff on the CATV system of Community Cablevision Company in Odessa is justified by the policy embodied in the regulatory scheme enacted by Congress in

the Communications Act, and such activity is exempted from the antitrust law. See, *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); see also, *Silver v. New York Stock Exchange,* 373 U.S. 341, 348-49 (1963).

7. The plaintiff lacks standing to complain in this antitrust court of any refusal of the defendants to carry its signal on the CATV system of Community Cablevision Company in Odessa, Texas, or to apply to the FCC for permission to do so. The Communications Act and the FCC regulation of carriage interposed itself between the defendants and the plaintiff as an arbiter of fair and "public interest" access by television stations to CATV systems. The plaintiff was not within the "target area"; and, as a matter of law, has not alleged antitrust injury, that is, the type antitrust laws were intended to prevent. See *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.,* 50 L.Ed.2d 701 (1977); *Jeffrey v. Southwestern Bell Telephone Company,* 518 F.2d 1129 (5th Cir. 1975).

8. There is no genuine issue as to material fact and the defendants are entitled to judgment as a matter of law.

9. The applicable statute of limitations, §4(b) of the Clayton Act, 15 U.S.C. §15(b), bars any cause of action accruing prior to April 26, 1970. *Zenith Radio Corp. v. Hazeltine Research Company, Inc.,* 401 U.S. 321 (1971). Moreover, since there was no signal of the plaintiff to be carried between March 16, 1971, and March 26, 1973, no claim for which relief can be granted may or can be stated for any failure or refusal of carriage during that period.

10. The FCC possessing exclusive jurisdiction, this court lacks jurisdiction under the antitrust laws, and the alleged events, activities, or transactions upon which the plaintiff relies are within exemptions or immunities from the antitrust laws.

11. The complaint, as amended, fails to state a claim for which relief can be granted.

12. The plaintiff lacks standing to assert that the events or transactions mentioned in its complaint constitute any violation of the Sherman Act.

13. For the foregoing reasons, this civil action should be dismissed and judgment entered for defendants.

SIGNED and ENTERED this ___ day of June, 1978.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MIDLAND TELECASTING COMPANY

v.

MIDESSA TELEVISION COMPANY, INC., et al.

No. MO-74-CA-47

ORDER AND JUDGMENT

Having considered the motion by Midessa Television Company, Inc. to dismiss and for judgment, together with the pleadings, affidavits, depositions, briefs and other documents on file, and the argument of counsel, and having this day made its findings of fact and conclusions of law, which are hereby incorporated by reference, the court enters this its order and judgment.

It is ORDERED, ADJUDGED and DECREED that Plaintiff Midland Telecasting Company take nothing as against defendants herein, and this civil action is hereby dismissed, with costs to be taxed against Plaintiff.

SIGNED and ENTERED this 13th day of June, 1978.

[SIG]

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-2515

D. C. Docket No. MO-74-CA-47

MIDLAND TELECASTING COMPANY,
Plaintiff-Appellant,

VERSUS

MIDESSA TELEVISION COMPANY, INC., et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before TUTTLE*, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

* Judge Tuttle did not participate in either the consideration or determination of this case.

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 29, 1980

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 78-2515

MIDLAND TELECASTING COMPANY,
Plaintiff-Appellant,

VERSUS

MIDESSA TELECASTING COMPANY, INC., ET. AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(June 25, 1980)

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

[SIG.]

UNITED STATES CIRCUIT JUDGE